Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

INDIANA DEPARTMENT OF CORRECTION,
Petitioner,

v.

BILL SAMPLEY AND MICHAEL HOLLAND
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the federal courts have the authority to order unsuccessful litigants to pay the expenses incurred by state correctional agencies to transport and secure prisoners to testify at trial, when the agencies act in compliance with writs of *habeas corpus ad testificandum* requested by those unsuccessful litigants?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court below are named in the caption. The Indiana Civil Liberties Union, which appeared in that court as *amicus curiae*, submitted a brief and participated at oral argument.

Respondents Bill Sampley and Michael Holland were plaintiffs in the district court. Defendants in the district court were Jack Duckworth and Robert Farley, who were the present and former superintendents of the Indiana State Prison when the case was filed. The defendants in the district court were not parties to the appeal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

INDIANA DEPARTMENT OF CORRECTION,
Petitioner,

v.

BILL SAMPLEY AND MICHAEL HOLLAND
Respondents.

PETITION FOR WRIT OF CERTIORARI

The Indiana Department of Correction respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals sought to be reviewed is published as *Sampley v. Duckworth*, 72 F.3d 528 (7th Cir. 1995), and is reproduced in the Appendix beginning at 1a. The unpublished orders of the district court denying Petitioner's motion for costs are reproduced in the Appendix at 12a and 17a.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on December 19, 1995. Rehearing was not sought. This Court has jurisdiction to review

final judgments of the courts of appeals under by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT OF THE CASE

Two prison inmates sued the present and former superintendents of their state prison in federal court under 42 U.S.C. § 1983, alleging a denial of their right to access to the courts. App. 1a. Jurisdiction to entertain the case lay with the district court pursuant to 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights suits).

At the inmates' request, the district court issued writs of *habeas corpus ad testificandum* that ordered the Indiana Department of Correction to transport ten inmates, one of whom was a plaintiff, from four different prisons to the place of the jury trial so that they could testify. App. 26a-27a.

The jury rejected the inmates' claims, and the Department of Correction asked the district court to order the plaintiffs to repay the disbursements the Department incurred in transporting and providing security for certain of the inmate witnesses. App. 26a. Initially the district court found the request not unreasonable but ruled that the Department was not a prevailing party and did not have standing to make such a request. App. 27a-29a. Upon reconsideration the district court held instead that there was no authority that permitted it to require the losing plaintiffs to compensate the Department for its disbursements. App. 13a-14a.

The Department appealed, but the court of appeals held that the district court lacked authority to order the inmate plaintiffs to repay the Department for its disbursements. App. 8a-10a.

REASONS FOR GRANTING THE WRIT

I. WHETHER STATE CORRECTIONAL AGENCIES CAN BE COMPENSATED FOR TRANSPORTING PRISONER-WITNESSES PRESENTS AN IMPORTANT, UNRESOLVED QUESTION, ESPECIALLY IN LIGHT OF BURGEONING PRISONER LITIGATION.

A. In light of the relentless growth of prisoner litigation, it is appropriate to require prisoner plaintiffs to balance their need for inmate witnesses against the costs they engender.

"[T]he question of who shall bear the financial burden of securing a prisoner's attendance [as a witness at trial is] an increasingly important question in view of the mounting number of prisoners' petitions for writs of habeas corpus and civil rights complaints . . . ." *California Dept. of Corrections v. United States*, 465 U.S. 1070, 1071 (1984), *denying cert. to Wiggins v. County of Alameda*, 717 F.2d 466 (9th Cir. 1983) (Rehnquist, J., dissenting from denial of certiorari). The question in this case -- whether federal trial courts have the power to award State correctional agencies the costs incurred in transporting prisoner-witnesses to trial -- has become even more important because of the explosion of prisoner litigation in the dozen years since 1984.

In 1995, prisoners filed approximately 40,000 civil lawsuits in the federal courts, making up about 16 percent of the federal courts' civil docket and close to half of the case load in some districts. Administrative Office of the United States Courts, *Federal Judicial Caseload* 40, 42 (1996). This number grew 14 percent from 1994, and has ballooned over the past ten years from just 18,595 cases

filed in 1985. Administrative Office of the United States Courts, *Federal Judicial Workload Statistics* A-11 (1985).

These cases constitute a significant drain on the States' litigation resources. The National Association of Attorneys General estimates that States spent $81.3 million defending lawsuits brought by prisoners in 1994. Laurel S. Walters, "States Rewrite Laws to Weed out Suits for Cruel and Unusual Jello," *Christian Science Monitor* 3 (Oct. 16, 1995). For example, Indiana spends more than $2 million per year defending lawsuits brought by prisoners, Barb Albert, "State Seeks to End Inmates' Frivolous Lawsuits," *Indianapolis Star* 1A (Nov. 15, 1994), and many other States spend in excess of $1 million annually.[1] California employs 51 lawyers and 22 paralegals in its attorney general's office alone to defend prisoner litigation. George Raine, "Inmates' 'ridiculous' lawsuits rile officials," *San Francisco Examiner* A1 (Feb. 11, 1996).

Of these amounts, the States expend a substantial sum just in complying with federal courts' writs of *habeas corpus ad testificandum*, which require the States not only to transport inmates but to deal with the exceptional security problems that inevitably arise when inmates venture outside the prison walls. In the case at bar, the costs for producing eight inmates from two institutions exceeded $5,100.00. App. 27a.

Prisoner litigation is particularly vexatious because

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[1] *See, e.g.*, "AG Testifies Against Inmate Suits," *Massachusetts Lawyers Weekly* 21 (July 3, 1995) ($1.5 million in Massachusetts); Catherine Candisky, "House OKs Bill to Cut Inmate Lawsuits," *Columbus Dispatch* 11C (Nov. 16, 1995) ($1.75 million in Ohio); Tim Bryant, "He's Not Amused," *St. Louis Post-Dispatch* 1D (Oct. 22, 1995) ($2 million in Missouri).

prisoners, unencumbered by the threat of losing licenses to practice law or by incurring many typical litigation costs, use litigation to entertain themselves or to harass their incarcerators. "[S]ome prisoners have admitted that they file suits just to irritate the courts. Many of the prisoner suits pending nationwide provide 'free courtrooms to prisoners to play their . . . sport of litigation.'" Tim Bryant, "He's Not Amused," *St. Louis Post-Dispatch* 1D (Oct. 22, 1995) (quoting Missouri Attorney General Jay Nixon). As a prisoner who had filed 135 lawsuits told a reporter, "[I]t's my way of getting even with the system." *CBS Evening News* (CBS television broadcast, Aug. 28, 1995).

Prisoners' use of litigation for "recreational" or harassment purposes can be deterred by requiring them to consider the costs they may incur for misusing the judicial process. *See Lumbert v. Illinois Department of Corrections*, 827 F.2d 257, 259-60 (7th Cir. 1987) (discussing use of financial considerations as incentive for discouraging meritless suits). Those jurisdictions that have sought to impose penalties upon prisoners who file frivolous litigation have found that such actions have reduced filings by prisoners. Arizona and Colorado, for example, passed laws subtracting "good time" credit days when prisoners are found to have filed frivolous litigation, and both States experienced decreases in prisoner-filed litigation in the months after the laws went into effect. Walters, *supra*; John Sanko, "Inmate Suits on Decrease in Colorado," *Rocky Mountain News* 52A (Sept. 24, 1995).[2]

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[2] Indiana recently passed legislation seeking to require prisoners to recognize some of the actual costs of the litigation they bring by obligating them to pay a filing fee based on the size of their prison bank accounts, and other legislation allowing for revocation of credit time for prisoners filing frivolous lawsuits. 1995 Ind. Acts 146 (*codified at* Ind. Code §§ 33-19-3-2.5, 34-4-16.5-6.5).

The decision of the court of appeals in the case at bar only makes this problem worse. It improves the position of a prisoner who would call fellow prisoners out of their cells to testify on his behalf, because it completely immunizes him from all financial responsibility for his action. The State, although a stranger to the action, is then required to pick up the tab.

Prisoners should be required to evaluate in advance the potential costs and benefits of generating the extraordinary expenses involved in transporting and guarding their fellow inmates. Although the courts themselves can do this before issuing writs of *habeas corpus*, their ability to do so is markedly inferior to that of the litigants themselves. To the extent that this process will dampen the enthusiasm of some prisoners to prosecute meritless cases or to call inmate witnesses of little or no testimonial value, it will accomplish the useful goal of putting them in a position more nearly like that of other litigants.

This Court should grant the writ to address the important issue of federal courts' power to apportion costs in these situations.

B. It is not proper in every instance to place on the States the entire burden of paying all of the expenses incurred in producing and guarding inmate witnesses.

The purpose of 28 U.S.C. § 1920, to require the losing litigant to bear many of the expenses incurred in litigation, is disserved by the court of appeals' interpretation. Other than attorney fees, perhaps the largest actual expense of prisoners' civil trials and other proceedings is the extraordinary expense incurred by a

State when it obeys federal writs to produce and guard prisoners called as witnesses.

In lawsuits brought by State prisoners, the court of appeals' interpretation of Section 1920 is particularly inappropriate because it intrudes upon States' sovereignty. Under 28 U.S.C. § 2243, federal courts have the power to order State correctional officials to produce prisoners to be witnesses, regardless whether the State has any interest in the proceedings. *Pennsylvania Bur. of Correction v. United States Marshals Service*, 474 U.S. 34 (1985). If comity is to be preserved, Section 1920 must permit States to recover their costs of complying with writs of *habeas corpus ad testificandum*.

The issue presented by this case is of particular importance because of its impact on the delicate balance between the federal courts and the several States. This balance is a distinguishing feature of our government, and maintaining it has been of crucial importance to this Court's jurisprudence. For example, this Court has held that the Eleventh Amendment forbids suits against States except where necessary to compel state officials to conform their conduct to supreme federal law, but that compelling obedience to state law is beyond the federal judicial power. *Compare Ex parte Young*, 209 U.S. 123 (1908), *with Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"). Similarly, with regard to writs of *habeas corpus ad subjiciendum*, this Court has recognized that it must defer to "the independent power of a State to articulate societal norms through criminal law" and permit States to enforce those norms. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). This Court has

recognized the offense against comity that results when States must defend their convictions on multiple occasions. *Id.* at 492.

It is one of the writs of *habeas corpus*, of course, that provides the federal court with the power to compel States to bring prisoners before it to testify in a civil trial or other proceeding. State officials are practically powerless to resist such writs, particularly where they are not parties to, and have no interest in, the civil proceeding.[3] To require a custodian to transport a prisoner to court is a necessary adjunct to the court's exercise of its jurisdiction. To forbid the State from recouping its disbursements from the losing party, however, pours salt in the wound.

By determining that federal district courts have the inherent discretion, or power under Section 1920, to require unsuccessful litigants to pay States' costs to transport and provide security for inmate witnesses, this Court can implement the purpose of Section 1920, maintain federal-state comity, and take a significant step toward addressing the costs that prisoner litigation is imposing on States. This Court should grant the writ to address this issue, which is of growing importance to all States.

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[3] While the instant case involved a suit against state correctional employees, prisoners are wont to sue employees of other entities as well. County correctional officials and state and local police officers are frequent defendants in federal civil rights actions brought by inmates in state prisons.

II. 28 U.S.C. § 1920 HAS BEEN APPLIED INCONSISTENTLY BY THE LOWER COURTS.

The Seventh Circuit in this case and the Sixth Circuit in *Sales v. Marshall*, 873 F.2d 115 (6th Cir. 1989), agree that district courts lack power to tax these expenditures in favor of a nonparty correctional agency. Othr federal courts have been certain that courts have this inherent power. In *Wiggins*, *supra*, the Ninth Circuit affirmed a district court order requiring California to bear the cost of transporting a prisoner to testify, but opined that "a district court judge has the discretion to allocate the costs of compliance with a writ *ad testificandum* in any number of combinations." 717 F.2d at 469.

Prior to this Court's decision in *Pennsylvania Bur. of Correction*, several circuits had decided that district courts had the inherent power to allocate to others costs incurred by correctional agencies in complying with writs of *habeas corpus ad testificandum*. *See, e.g., Story v. Robinson*, 689 F.2d 1176 (3d Cir. 1982); *Ballard v. Spradley*, 557 F.2d 476 (5th Cir. 1977). Ironically, the Seventh Circuit was among these courts. *See Ford v. Caballo*, 577 F.2d 404 (7th Cir. 1978) (finding that federal courts have inherent power to apportion costs of complying with writ *ad testificandum*). Moreover, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), does not foreclose the allocation of these costs: Its holding is that Section 1920 defines the costs available under Fed. R. Civ. P. 54[4], not that the costs defined by Section 1920 are available only in proceedings under Rule 54 or that 28 U.S.C. § 1821 limits all costs recoverable under Section 1920.

[4] Rule 54 is not at issue here, as the Indiana Department of Correction was not a party to the suit in the district court.

Although there may be no technical circuit conflict within the meaning of this Court's Rule 10.1, the decision in the instant case is in conflict with *Marks v. Calendine*, 80 F.R.D. 24 (N.D.W. Va. 1978), *aff'd sub nom. Flint v. Hayes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982), in which the district court taxed the state's costs for transporting and guarding prisoner witnesses against the losing parties pursuant to Section 1920. 80 F.R.D. at 31. The district court did so noting that the cost is "not, strictly speaking, an expense of the Defendants, [but] it is an actual expense of the defense of this action. This expense was borne by the State of West Virginia which provided the defense services to the named defendants." *Id.* This allocation of costs was not even challenged on appeal.

This Court should grant the petition in order to resolve the inconsistency in the lower courts' application of Section 1920 and to answer the question that remains open after *Pennsylvania Bur. of Correction*: Whether federal courts have the power to order unsuccessful litigants to repay States for their disbursements in complying with federal orders to produce inmate witnesses.

III. THE DECISION OF THE COURT OF APPEALS REPEALS PART OF 28 U.S.C. § 1920.

Congress has given federal district courts substantial power to apportion expenses to achieve justice, including the power to order litigants to reimburse State prison authorities for their disbursements in producing inmate witnesses. That power is expressed in these words: "A judge or clerk of any court of the United

States may tax as costs the following: . . . (3) Fees and disbursements for printing and witnesses." 28 U.S.C. § 1920.

The Department undeniably did disburse funds for producing witnesses pursuant to the district court's order, both by supplying manpower to ensure security and by providing the vehicles to carry the inmate witnesses and the correctional officers. Because the Department claims reimbursement of these expenditures, the statutory phrase "disbursements . . . for . . . witnesses" in Section 1920 is at issue in this case.

This case grows out of Section 1920 alone. It does not directly involve 28 U.S.C. § 1821 because the Department did not disburse its public funds to pay witness "fees," which are defined in that section. Witness "fees" are amounts paid, either directly or indirectly, to witnesses, not to others as reimbursement for their expenditures in producing witnesses. This is evident both from the language of Section 1821 itself[5] and from, *e. g.*, *Sales v. Marshall*, 873 F.2d 115, 119-20 (6th Cir. 1989) (Section 1821 "provides for the payment of certain fees and allowances to witnesses, not to parties. The fees and allowances pertain to travel and subsistence expenses incurred by witnesses.").

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[5] It is apparent from the statute that the costs assessed there are paid to the witness: "Except as otherwise provided by law, a witness . . . shall be paid the fees and allowances provided by this section." 28 U.S.C. § 1821(a)(1). *See also* subsections (b) ("A witness shall be paid . . . ."); (c)(1) ("A witness . . . shall be paid . . ."); (d)(1) ("A subsistence allowance shall be paid to a witness . . ."); (e) ("An alien . . . shall be ineligible to receive the fees or allowances provided by this section."); (f) ("Any witness who is incarcerated . . . may not receive fees or allowances . . . .").

Because Section 1821 defines "fees," a premise that cannot be gainsaid after *Crawford*, the same section cannot define "disbursements" unless the two words mean the same thing. But giving those two words the same meaning violates "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

The Department is eligible for reimbursement in this case because the word "disbursements" in Section 1920 must apply to expenditures other than the "fees" limited by Section 1821. This point is apparent even without *Crawford*, because Section 1821 does not use the word "disbursement" at all; it refers only to "the fees and allowances provided by this section." Section 1821(a)(1). If Congress intended all of the expenditures described in Section 1821 to be covered by Section 1920(3) it surely would have used the same terms: The two statutes were enacted at the same time.

The remaining question, the scope of the expenses contemplated by the phrase "disbursements for witnesses," is answered by the plain meaning of the words themselves, which permit reimbursement of the Department's expenditures. The phrase includes such money expended in producing witnesses as falls beyond the ambit of Section 1821. The money the State spends in providing inmate witnesses fits neatly within this area.

The court of appeals ruled that the word "disbursements" in Section 1920 has no meaning other than that carried by the word "fees" in the same phrase. In choosing to ignore "disbursements," the court effectively repealed that term. This was improper. The case at bar shows that the word "disbursements" has an

important role to play in the fair allocation of costs as between parties to a federal action and in maintaining the important goal of comity between the Union and the sovereign States.

The Court should grant certiorari to give effect to congressional intent and restore 28 U.S.C. § 1920 to its full meaning.

CONCLUSION

For the reasons stated in this petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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March 18, 1996

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In the
United States Court of Appeals
For the Seventh Circuit

No. 95-1842

BILL SAMPLEY AND MICHAEL HOLLAND,

Plaintiffs-Appellees,

v.

JACK DUCKWORTH, in his personal capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 88 C 405--**Robert L. Miller, Jr.**, Judge.

ARGUED SEPTEMBER 15, 1995-DECIDED DECEMBER 19, 1995

Before POSNER, *Chief Judge*, and CUDAHY and MANION, *Circuit Judges*.

CUDAHY, *Circuit Judge*. This case presents only one issue: whether district courts have authority to impose upon a losing plaintiff the expenses incurred by state corrections officials in transporting prisoners to be witnesses in a civil suit. The case had its origins in a civil rights suit brought by plaintiffs Bill Sampley and Michael Holland against the Superintendent of the Indiana State Prison, Jack Duckworth, involving conditions at that institution. During the course of the lawsuit the district court issued orders of transportation requiring the Indiana Department of Corrections to bring a number of prisoner witnesses to court to testify. The plaintiffs did not prevail in their lawsuit and costs were assessed against them in favor of the

defendant. This appeal, however, concerns a third-party application for reimbursement brought by the Indiana Department of Corrections (IDOC). IDOC asked that the district court direct the losing plaintiffs to reimburse them for the costs of transporting the prisonerwitnesses to court. The district court denied the request, on the grounds that it lacked authority to mandate such a payment. We affirm.

Analysis

Through the issuance of a writ of habeas corpus ad testificandum, state prison officials may be required to produce a prisoner in their custody to testify at a federal trial. The writ of habeas corpus ad testificandum is authorized by 28 U.S.C. § 2241 which provides, in relevant part:

> (a) Writs of habeas corpus may be granted by . . . the district courts . . .
>
> . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless–
>
> . . .
>
> (5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2243 further prescribes that "the writ . . . shall be directed to the person having custody of the person detained" and that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." This statute codifies the common law writ. The writ was initially incorporated in the federal statutes in 1789, and there is no historical requirement that

custodians be reimbursed for their costs of compliance with the writ. *See, e.g., Story v. Robinson*, 689 F.2d 1176, 1179 (3d Cir. 1982); *Sales v. Marshall*, 873 F.2d 115, 119 (6th Cir. 1989).

In this appeal IDOC does not contest that the court may order it to produce prisoner-witnesses pursuant to a writ of habeas corpus ad testificandum, nor does it suggest that the court is *required* to charge the costs of IDOC's compliance with the writ against the losing plaintiff. IDOC argues, however, that the district court erred in its belief that it lacked discretionary authority to order reimbursement of IDOC's costs of compliance. IDOC urges two possible sources of such district court authority. First, this power may be sought in the statutory framework governing reimbursement of trial costs. Alternatively, authority might be found in the common law powers associated with the writ of habeas corpus ad testificandum which were attached to it at the time it was codified. After considering each of these possible sources, we concur with the district court that nothing in either the statutory framework or the common law authorizes the requested reimbursements.

IDOC claims that its request is permitted under 28 U.S.C. § 1920, which is part of the network of statutes and rules providing for reimbursement of costs to prevailing parties in civil actions. Reimbursement for some of the costs incurred by witnesses who testify at trial is routinely awarded to *prevailing parties* under the terms of Fed. R. Civ. P. 54(d). That rule provides that, with a few exceptions not relevant here, "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." The expenses which may be taxed as costs, including expenses for witnesses, are enumerated in §1920:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> . . .
>
> (3) Fees and disbursements for printing and witnesses; . . .
>
> 28 U.S.C. § 1920.

The costs permissibly paid to witnesses are specified further by 28 U.S.C. § 1821 which provides, in part:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> . . .
>
> (f) Any witness who is incarcerated at the time that his or her testimony is given . . . may not receive fees or allowances under this section . . . .

(The elided section of part (a) contains a list of specified reimbursable expenses, such as transportation and accommodation costs.) As indicated, prisoners themselves are expressly prohibited from receiving witness fees or allowances. 28 U.S.C. § 1821(f).

IDOC argues that the scope of § 1920 extends beyond defining the costs to be paid to prevailing parties under Rule 54(d) to encompass reimbursement of third parties, such as itself, for the expenses of complying with a writ of habeas corpus ad testificandum. One of the items which, under § 1920(3), may be taxed as costs is "fees and disbursements for printing and witnesses." IDOC argues

that, while witness "fees" are those items described in sec. 1821, the "disbursements" in § 1920(3) include expenses incurred by IDOC (a non-party to the suit) in transporting witnesses in compliance with a writ of habeas corpus ad testificandum. IDOC's argument is precluded, however, by the Supreme Court's treatment of the relationship between Rule 54(d), § 1821 and sec. 1920 in *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987). That case determined that Rule 54(d) does not authorize the payment to an expert witness of any witness fees in excess of the limits imposed by § 1821 in its specification of the fees authorized by § 1920. The petitioner there argued that the scope of Rule 54(d) was broader than that of § 1920. While the appellant here urges the converse--that § 1920 is broader in scope than Rule 54(d)--the two arguments share the contention that Rule 54(d) and § 1920, while overlapping in scope, are not coextensive. The Supreme Court in Crawford rejected that contention.

In *Crawford*, the Supreme Court described the interrelation of the three provisions at issue, noting that ". . . § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the court otherwise directs." *Crawford*, 482 U.S. at 441. Leaving no doubt as to its view of the function of § 1920, the Court opined:

> We think the better view is that § *1920 defines the term 'costs' as used in Rule 54(d)*. Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d).
>
> *Id.* (emphasis added).

The Supreme Court apparently does not view § 1920 as having any role beyond the purview of Rule 54(d). Indeed, its *Crawford* holding that § 1920 exhausts *all* costs which may be taxed under Rule 54(d) is based on its reasoning that "if Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever." *Id.*

If §1920 played a role outside of the Rule 54(d) framework, the *Crawford* reasoning would collapse. If, as IDOC contends, § 1920 provided for payments to third parties, which are completely outside of the Rule 54(d) umbrella, then construing Rule 54(d) to provide discretion beyond the confines of §1920 would not leave § 1920 with "no role whatsoever." The reasoning in *Crawford* is premised on the thesis that § 1920 *only* authorizes payments as directed by Rule 54(d).

Ignoring this direct discussion of the role of § 1920, IDOC instead proposes a strained interpretation of both the statutory language and the language in *Crawford*. IDOC begins by noting correctly that *Crawford* states that the statutory phrase "fees . . . for . . . witnesses" is exhaustively defined in § 1821, which specifies the daily fees, travel allowances and so on, which may be paid to witnesses. Beyond this, however, IDOC contends that *all* of the payments authorized by § 1821 are included in the statutory term "fees" and none in the term "disbursements." On this basis IDOC then argues that, given that statutes are to be construed so as to give effect to each word, the word "disbursements" in § 1920(3) must be given some distinct meaning. IDOC then puts the roof on this house of cards by urging that "disbursements" therefore encompasses expenses incurred by the custodian of a prisoner-witness in complying with a writ of habeas corpus ad testificandum.

This chain of reasoning is flawed in its inception. As noted above, the Court in *Crawford* did state that "the witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821." However, the Court never suggested that § 1821 defines only the *fees* authorized by § 1920(3) and not the disbursements. Indeed, the Court's reasoning makes it quite clear that the fees and disbursements referred to in §1920(3) are both included in § 1821. The Court's statement regarding the relationship between § 1920(3) and § 1821 reads in its entirety as follows:

> The witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821:
>
> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> . . . .
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> *Crawford*, 482 U.S. at 440-41 (ellipses in original).

Hence, the Court simply held that § 1920(3)'s witness fee is defined by these two subsections of § 1821. There is no suggestion that the entire section defines solely witness fee, leaving disbursements undefined.

IDOC's reliance on the general rule of statutory construction that statutes be construed so as to give effect to all of their language is thus unavailing. Many, if not most, of the items covered by § 1821 are not "fees" in any ordinary sense of the term. These items, such as travel reimbursements, are deemed "allowances" by § 1821. Surely they could easily qualify as disbursements under § 1920(3). Nothing more than this natural reading of § 1821 is needed to save the word "disbursements" in § 1920 from statutory oblivion.

We thus conclude that § 1920(3) does not empower the district court to order the reimbursement sought by IDOC. In so concluding we are in accord with the Sixth Circuit which considered an analogous issue and concluded that "no provision in § 1920 permits courts to tax as costs against a losing party the custodian's expenses incurred in complying with a prisoner's writ of habeas corpus ad testificandum." *Sales*, 873 F.2d at 119.

We now turn to the question whether the common law context of § 2241 can support the reimbursement requested by IDOC. As we recently noted in *Ivey v. Harney*, 47 F.3d 181, 183 (7th Cir. 1995), "laws often require or permit a court to do something without providing details. Omission leaves in place the common law powers of the federal courts, and using these interstitial powers the courts put flesh on the statutory bones." As we pointed out with approval in *Ivey*, the Second Circuit in *Rivera v. Santirocco*, 814 F.2d 859 (2d Cir. 1987), relied on the common law background of the writ of habeas corpus ad testificandum in upholding a district court's ordering the Marshals Service and FBI to take custody of a state prisoner during a trial in which that prisoner was a necessary witness.

The power to fill interstices, however, does not imply a power to add extensions. Indeed, that was the lesson of this court's decision in *Ivey*. In *Ivey*, we dealt with the question whether the All Writs Act, 28 U.S.C. § 1651(a), authorizes a district court to order a state department of corrections to transport a prisoner some distance to be examined by a physician in the pre-trial phase of a lawsuit. The court found that this extrapolation from a court's authority to command a state custodian to produce a prisoner was precluded by the language of § 2241(c). The statute provides that "the writ of habeas corpus shall not extend to a prisoner *unless* . . . it is necessary to bring him into court to testify or for trial." (emphasis added).[1]

IDOC does not persuade us that the common law writ of habeas corpus was coupled with any power to charge against the loser the costs of bringing friendly witnesses to court. It is true that the Ninth Circuit in

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[1] In *Ivey*, we failed to find common law authority for an order requiring a custodian to produce a prisoner for an examination by an expert witness in part because "nothing in the common law supports an order directing a third party to provide free services that facilitate litigation." 47 F.3d at 185. IDOC quotes this statement in support of its argument. The statement, however, referred to an order which we found to be outside the compass of the writ of habeas corpus ad testificandum. It supported our finding that the district court lacked the power even to issue the order in question. In contrast to the situation in *Ivey*, both statute and common law "support an order directing a third party to provide free services that facilitate litigation" when the third party is the custodian of a prisoner and the order is a writ of habeas corpus ad testificandum. IDOC does not contest this authority. The cited statement from *Ivey* thus has no bearing on the issue at hand.

Wiggins v. County of Alameda, cited by IDOC, concluded that the district court had discretion to allocate costs of transportation of a state prisoner between state and federal authorities. 717 F.2d 466, 469 (9th Cir. 1983) (upholding allocation to state of all costs of transporting prisoner-plaintiff), *cert. denied sub nom. California Dept. of Corrections v. United States*, 465 U.S. 1070 (1984). But that case has been overruled on this point by the Supreme Court in *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), which held that only *custodians* of prisoners could be ordered to bear the costs of transporting them pursuant to a writ of habeas corpus ad testificandum. With regard to reimbursing the state for its expenses in transporting a prisoner, however, *Wiggins* found that "when there is no statutory authority . . . authorizing reimbursement to the state for the costs of compliance with such a writ, then there is no basis upon which the state can seek compensation for its expenses." 717 F.2d at 469. The *Wiggins* court went on to say, and we agree, that "enactment of a statute, compliance with which will require a state or entity to incur costs, does not in itself create a right to reimbursement." *Id.*

IDOC cites only one case in which the cost of transporting prisoner-witnesses was taxed as costs against a losing plaintiff. *Marks v. Calendine*, 80 F.R.D. 24 (N.D. W. Va. 1978), *aff'd sub nom. Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). In that case, the plaintiff sued the warden of the prison in which the prisoner-witnesses were incarcerated. The costs of transporting the witnesses were assumed by the court to be costs borne by the defendant for which he could be reimbursed. The case provided no analysis of whether costs may be awarded to non-parties and the propriety of the transportation cost award in particular was apparently not raised on appeal. The opinion affirming the district court

decision in *Marks* focused entirely on the question whether costs may be taxed against indigents *at all*. *Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). We are not persuaded by these decisions that the taxation of costs against non-parties is authorized.

In summary, IDOC has not persuaded us to adopt its creative interpretation of 28 U.S.C. § 1920(3), an interpretation which is at odds with the reasoning of the Supreme Court in *Crawford* and which is given no support by this court's opinion in *Ivey*. Neither has it produced any convincing authority that there is a common law basis for a district court to authorize the requested reimbursement. We therefore affirm the judgment of the district court.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BILL SAMPLEY and MICHAEL HOLLAND,	)	
Plaintiffs,	)	
vs.	)	CAUSE NO. S88-405M
JACK DUCKWORTH,	)	
Defendant.	)	

MEMORANDUM AND ORDER

By order entered November 22, 1994, the court deferred ruling on Supt. Duckworth's verified bill of costs and afforded Supt. Duckworth an opportunity to file an affidavit in support of the items sought as part of the costs as required by 28 U.S.C. § 1924, detailing why the unidentified discovery is recoverable and was necessary. The court's November 22 order also denied the Indiana Department of Correction's "Petition for Reimbursement of Costs Expended Pursuant to Court Order." The court has discretion pursuant to Fed. R. Civ. P. 54(d) and § 1920 to determine whether the prevailing party's expenses are taxable costs. E.g., SCA Services, Inc. v. Lucky Stores, 599 F.2d 178, 181 (7th Cir. 1979).

With the Declaration in Support of Taxation of Costs (filed December 16, 1994), Supt. Duckworth has satisfied his burden of showing that the expenses claimed in his verified bill of costs, including the cost for 576 copies of discovery, were accurate and necessary. See M.T. Bonk

Co. v. Milton Bradley Co., 945 F.2d 1404, 1410 (7th Cir. 1991); Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 641-644 (7th Cir. 1991). The court finds that the 576 copies of discovery -- copies provided during discovery and prior to trial at the request of the plaintiffs and/or plaintiffs' counsel -- are taxable costs. Therefore, Supt. Duckworth's bill of costs may be taxed against the plaintiffs. 28 U.S.C. § 1924.

The Indiana Department of Correction ("DOC"), a nonparty to this cause, has asked the court to alter or amend its November 22 Order which denied DOC's petition for reimbursement of costs expended pursuant to the court's orders. DOC primarily relies on equity and the court's authority to tax costs against parties. DOC also relies on 28 U.S.C. § 1920[1] and the Seventh Circuit's decision in McGill v. Faulkner, 18 F.3d 456 (7th Cir.), cert. denied, 115 S. Ct. 233 (1994), and Rule 71 of the Federal Rules of Civil Procedure. None of these provide the court with authority to award costs to the DOC under the circumstances presented.

A motion for reconsideration should be denied unless it clearly demonstrates manifest error of law or fact or presents newly discovered evidence. Dresser Indus., Inc. v. Pyrrhus AG, 936 F.2d 921, 936 (7th Cir. 1991); Publishers Resource, Inc. v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985); Amcast Indus. Corp. v. Detrex Corp., 822 F. Supp. 545 (N.D. Ind. 1992), aff'd in part, rev'd in part on other grounds, 2 F.3d 746 (7th Cir. 1993), and cert. denied, 114 S. Ct. 691 (1994). A motion for reconsideration "cannot be used to

[1] This statute authorizes an award of witness fees. Witness fees are fees paid to the witness. 28 U.S.C. § 1821. Witnesses who are incarcerated are not entitled to receive any witness fees. 28 U.S.C. § 1821(f).

raise arguments that could, and should, have been made before the judgment issued," Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986); see also Holstein v. City of Chicago, 149 F.R.D. 147, 148 (N.D. 111. 1993), aff'd, 29 F.3d 1145 (1994); "cannot be used to argue a case under a new legal theory," Id.; and "cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the . . . motion." Keene Corp. v. International Fidelity Ins. Co., 561 F. Supp. 656, 665-666 (N.D. Ill. 1982), aff'd, 735 F.2d 1367 (7th Cir.), and aff'd, 736 F.2d 388 (7th Cir. 1984); see also Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir.), as amended, Rosenthal & Co. v. Rothwell Cotton Co. 835 F.2d 710 (7th Cir. 1987); Publishers Resource, Inc. v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985) (both cases quoting Keene Corp. v. Int'l Fidelity Ins., 561 F. Supp at 665-66). The party moving to reconsider must establish that, through the exercise of due diligence, it could not have presented the "newly discovered evidence" during pendency of the earlier motion. Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d at 251.

DOC has not demonstrated a manifest error of law or fact in the court's denial of its petition for reimbursement of costs; importantly, DOC has not provided the court with any authority to establish that, DOC as a non-party, is entitled to reimbursement of its costs incurred in transporting the prisoner witnesses and Mr. Sampley to trial. As this court stated previously, the DOC's claim is not unreasonable; however, the court must deny the DOC's motion to alter or amend the denial of reimbursement of costs for the want of authority to so reimburse DOC.

For the foregoing reasons, the court:

(1) GRANTS Supt. Duckworth's verified bill of costs, AWARDING Supt. Duckworth $564.00 in costs to be TAXED against the plaintiffs Michael Holland and Bill Sampley; and

(2) DENIES the Indiana Department of Correction's motion to alter or amend judgment denying reimbursement of costs (filed December 9, 1994 (#219)).

The clerk of the court is directed to enter judgment, pursuant to Fed. R. Civ. P. 58, accordingly.

SO ORDERED.

ENTERED: February 27, 1995

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: T. Quigley
D. Moore
B. Sampley

United States District Court

Northern District of Indiana

BILL SAMPLEY
MICHAEL HOLLAND

JUDGMENT IN A CIVIL CASE

v.

Case No. 3:88CV405RM

JACK DUCKWORTH

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Supt. Duckworth's bill of costs is granted and Supt. Duckworth is awarded $564.00 in costs to be taxed against plaintiffs Michael Holland and Bill Sampley.

Interest rate: 6.57%

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

March 3, 1995 Geraldine J. Crockett

By: /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BILL SAMPLEY and MICHAEL HOLLAND,	)	
Plaintiffs,	)	
vs.	)	CAUSE NO. S88-405M
JACK DUCKWORTH,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This cause is before the court on the following post-trial motions:

(1) the Indiana Department of Correction's "Petition for Reimbursement of Costs Expended Pursuant to Court Order" (filed August 11, 1994 (#210));

(2) the plaintiffs' Motion for Continuance of Taxation of Costs (filed August 22, 1994 (#215));

(3) the plaintiff Bill Sampley's Motion for an Enlargement of Time So Plaintiffs' Can Respond to Indiana Department of Correction's Petition for Reimbursement

(sic) of Costs Expended Pursuant to Court Order (filed August 17, 1994 (#213)); and

(4) Bill Sampley's Motion for Leave to File Delayed Notice of Appeal (filed August 17, 1994 (#212)).

For the reasons which follow, the court strikes Mr. Sampley's motion for an enlargement of time and motion for leave to file a delayed notice of appeal, grants the plaintiffs' motion for continuance of taxation of costs, and denies the Indiana Department of Correction's petition. The court allows Supt. Duckworth to and including December 30, 1994 to file an affidavit in support of his verified bill of costs.

A. Motion for Leave to File Delayed Notice of Appeal

Mr. Sampley has filed a motion for leave to file a delayed notice of appeal, purportedly proceeding pro se. Mr. Sampley states that he seeks such leave because he has allegedly "been dumped by his attorney, without notice." Mr. Sampley further states that he:

> had not intended to file an appeal after the trial . . . until he learned that Defendant intended to seek costs. Plaintiff informed his attorney . . . that he did want to appeal the costs aspect of the final judgment and thought she would file a Notice of Appeal. Plaintiff was informed . . . in a letter from his . . . attorney, that she no longer had time to spend on the case. . . .

Mr. Sampley states that he received the letter from his attorney on August 15, 1994.

Rule 4 of the Federal Rules of Appellate provides in pertinent part:

> (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . .
>
> * * *
>
> (5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). . . . No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Fed. R. App. P. 4(a)(1) and (5). Assuming that Mr. Sampley intends to appeal from the June 27 Order in which the court deferred ruling on Supt. Duckworth's petition for costs, Mr. Sampley's motion, filed on August 17, would be timely.[1] Under this assumption, were the court to grant

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[1] Under Rule 4(a)(1), a notice of appeal would be due July 27 and consequently, under Rule 4(a)(5), a motion for extension of time to file a notice of appeal would be due no later than August 26.

Mr. Sampley's motion, Mr. Sampley would have ten days from the date of entry of this order within which to file his notice of appeal. Assuming that Mr. Sampley intends to appeal from the court's order taxing costs against the plaintiffs, because the court has not entered an order awarding costs, the time for filing a notice of an appeal has not yet commenced.

Since an order granting or denying an award of costs following an entry of final judgment is an order from which an appeal lies, see Estate of Borst v. O'Brien, 979 F.2d 511, 517 (7th Cir. 1992) (affirming trial court's award of attorney fees and costs with a reduction in costs), an award of costs is a judgment, see Fed. R. Civ. P. 54(a), and thus not effective and not enforceable until the clerk has complied with Rule 58.[2] Because the court's order

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[2] A judgment is not effective until it is set forth on a separate document pursuant to Rule 58 of the Federal Rules of Civil Procedure and entered on the district court's civil docket pursuant to Rule 79(a). See Fed. R. Civ. P. 58; see also TMF Tool Co. v. Muller, 913 F.2d 1185, 1188 (7th Cir. 1990) ; Jones v. Jones Bros. Const. Corp., 126 F.R.D. 54, 55 (N.D. Ill. 1989). The clerk must comply with the rules before a court order can become an effective judgment. Jones v. Jones Bros. Const. Corp., 126 F.R.D. at 55-56. The court finds the reasoning of Jones Bros. Const. Corp. persuasive:

> Rule 58 says nothing about there being only one Rule 58 judgment per lawsuit, instructing instead that '[e]very judgment shall be set forth on a separate document.' . . . Fed. R. Civ. P. 54(a) states that '[j]udgment as used in these rules includes a decree and any order from which an appeal lies.' Since an award of attorney's fees following an entry of final judgment is an order from which an appeal

awarding costs to Supt. Duckworth has not been set forth on a separate document pursuant to Rule 58 and entered on the district court's civil docket pursuant to Rule 79(a), the judgment is not yet effective and enforceable against the plaintiffs.

Although the court is sympathetic to Mr. Sampley's position, the court will not grant Mr. Sampley's motion because the motion should be stricken as improper. Despite any allegations contained in Mr. Sampley's motion, when Mr. Sampley filed his motion he was, and still is, represented by counsel, who filed objections and a motion on behalf of the plaintiffs on August 19, two days after Mr. Sampley filed his motion, purportedly proceeding pro se. Accordingly, Mr. Sampley's motion to file delayed notice of appeal should be stricken.

B. Motion for Enlargement of Time

For the same reason, the court finds that Mr. Sampley's motion for an enlargement of time should be stricken. Mr. Sampley's motion for an enlargement of time was filed on August 17. Two days later, plaintiffs' counsel filed "Plaintiffs' Objections to Requests for Costs and Motion for continuance of Taxations of Costs" on behalf of the plaintiffs. Thus, when Mr. Sampley filed his motion for an enlargement of time he was, and still is, represented by counsel.

> lies, . . . such an award is a judgment, which does not become effective, and thus does not become enforceable . . . until the clerk complies with Rule 58.

126 F.R.D. at 56 (citation omitted).

Moreover, the plaintiffs' objection, filed by counsel for the plaintiffs, responds in part to DOC's petition for reimbursement of costs. As a result, Mr. Sampley's motion for an enlargement of time to respond is moot.

Accordingly, the court finds that Mr. Sampley's motion for an enlargement of time should be stricken.

C. Plaintiffs' Motion for Continuance of Taxation of Costs

By its June 27 Order, the court concluded that Supt. Duckworth, as the prevailing party, is entitled to an award of costs, but deferred ruling on the petition of costs to allow Supt. Duckworth to file a verified bill of costs. Supt. Duckworth filed his verified bill of costs in the amount of $564.00.

The plaintiffs filed their objections to Supt. Duckworth's verified bill of costs and their motion for a continuance of the taxation of costs. The plaintiffs contend that: (1) photocopying expenses are not recoverable under 28 U.S.C. § 1920; (2) the $0.30 rate per page exceeds the customary rate of photocopying businesses in the area; (3) that plaintiffs' counsel has no recollection of receiving 576 pages in response to discovery; and (4) an extra set of photocopies of discovery materials is not recoverable. The plaintiffs also restate two arguments made in their previous response to Supt. Duckworth's motion for attorney fees and costs. As the court ruled previously that Supt. Duckworth is entitled to an award of costs, the court need not revisit those two issues here.

Rule 54(d)(1) of the Federal Rules of Civil Procedure, which provides for the taxation of costs, provides in pertinent part:

> [C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . . Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

The clerk's August 11 Notice states that costs were to be taxed in this cause on August 22. The plaintiffs served their motion to continue the taxation of costs on August 18. Thus, the plaintiffs' motion was served within five days of the date on which costs were to be taxed and consequently, the court may review that taxation of costs.

28 U.S.C. § 1920 governs awards of costs to the prevailing party. See, e.g., Estate of Borst v. O'Brien, 979 F.2d 511, 517 (7th Cir. 1992). 28 U.S.C. § 1920 provides:

> A judge . . . in the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshals;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;

> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under § 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under § 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920. The expense for copying materials reasonably necessary are recoverable costs under § 1920. E.g., State of Ill v. Sangamo Const. Co., 657 F.2d 855, 867 (7th Cir. 1981). To the extent expenses are recoverable under § 1920, the prevailing party must show that the costs were reasonably necessary. See M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1410 (7th Cir. 1991); Northbrook Excess and Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 641-644 (7th Cir. 1991). The losing party bears the burden of establishing that the prevailing party is not entitled to the costs requested. Meister v. Georgia-Pacific Corp., No. 92 C 6616, 1994 WL 127309, at *1 (N.D. Ill. April 7, 1994). The court has discretion pursuant to Fed. R. Civ. P. 54(d) and § 1920 to determine whether the prevailing party's expenses are taxable costs. E.g., SCA Services, Inc. v. Lucky Stores, 599 F.2d 178, 181 (7th Cir. 1979).

The court cannot yet determine the total amount of costs to be taxed against the plaintiffs, however. Supt. Duckworth's verified bill of costs seeks an award of costs, including the expense of "the production and copying of. . . documents with sufficient copies for filing, service and retention of two copies for counsel . . . ." The documents include 576 copies of unidentified discovery in the amount of $172.80; three trial notebooks (1272 copies) in the amount of $381.60; 10 copies (20 pages total) of the floor plan used as demonstrative evidence in the amount of $6.00; and 2 copies (12 pages total) of the proposed interrogatory form in the amount of $3.60. Supt. Duckworth's costs total $564.00.

To the extent expenses such as those in the Supt. Duckworth's verified bill of costs are recoverable at all under § 1920, he must show that the costs were necessary. See M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1410 (7th Cir. 1991); Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 641-644 (7th Cir. 1991). Although it is apparent that the costs for the trial notebooks, floor plan, and proposed interrogatory form were necessary, Supt. Duckworth has ventured no such showing with respect to the unidentified discovery. Therefore, the court defers ruling on Supt. Duckworth's bill of costs to enable Supt. Duckworth further opportunity to show that the costs for the unidentified discovery was necessary.

Furthermore, Supt. Duckworth has failed to comply with 28 U.S.C. § 1924 which provides:

> Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized

> attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

Supt. Duckworth's verified bill of costs did not have an affidavit attached to it as required by § 1924. The attached "verification" made by his counsel does not suffice.[3] Without an affidavit, the bill of costs may not properly be taxed. 28 U.S.C. § 1924.

Accordingly, the court defers ruling on Supt. Duckworth's verified bill of costs to allow the submission of an affidavit in support of the items sought as part of the costs as required by 28 U.S.C. § 1924, detailing why the unidentified discovery was necessary. The court affords Supt. Duckworth to and including December 30, 1994 within which to do so.

D. DOC's Petition for Reimbursement

The Indiana Department of Correction ("DOC"), a nonparty to this cause, has filed a petition for reimbursement of costs expended pursuant to the court's orders, see court orders entered March 3, 1994 (docket entry ##157-166), regarding the transportation of a number of prisoner witnesses and plaintiff Sampley for the trial of this cause. In producing the witnesses and the plaintiff, DOC provided security and transportation. DOC represents that it incurred more than $5,000.00 in transporting the prisoner witnesses, providing for their security, and providing them meals during trial. DOC represents that it

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[3] The Verification states "I declare under penalty of perjury that the foregoing statement of the costs in this cause is true and correct."

incurred $1,143.54 in salary expenses for prison personnel present in the courtroom during trial and $4000.01 for vehicle use and staffing for transportation of Mr. Sampley and the other prisoner witnesses. DOC represents that the costs it seeks represent solely the expenses incurred in transporting witnesses from the Indiana State Prison or the Maximum Control Complex.

DOC contends that if it is not reimbursed for its expenses that it would have been compelled to expend funds without due process and in violation of the Eleventh Amendment. DOC seeks an order that the plaintiffs be jointly and severally liable for the costs of transportation and security of the prisoner witnesses and Mr. Sampley. DOC seeks an order which directs that the costs be applied as a "freeze" on Bill Sampley's inmate trust account and that the funds in the account or to be entered into the account be applied toward the costs until the award is satisfied in full.

The plaintiffs object to DOC's petition for reimbursement. The plaintiffs contend that DOC is not a "prevailing party" entitled to reimbursement of costs. The plaintiffs contend that to allow reimbursement would violate due process and equal protection.

The court's ultimate inquiry is whether non-party DOC is entitled to reimbursement of costs incurred in transporting prisoner witnesses and the plaintiff in this § 1983 action. Before the court may reach that ultimate inquiry, however, the court must determine whether DOC has standing to petition for reimbursement of its costs incurred.

DOC has provided the court with no authority to establish that, as a non-party, it is entitled to petition the

court for reimbursement of its costs incurred in transporting the prisoner witnesses and Mr. Sampley.[4] Rule 71 of the Federal Rules of Civil Procedure does not provide the authority, because the court's orders directing DOC to produce the prisoner witnesses and Mr. Sampley were arguably not made in DOC's "favor" and because DOC is not seeking to enforce those court orders. Because DOC has not established that its petition for costs is properly before the court, the (sic) must refuse to consider DOC's petition for reimbursement of costs.

In any event, as the plaintiffs contend, DOC as a non- party, is not a prevailing party for purposes of awarding costs pursuant to Rule 54. See Fed. R. Civ. P.

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[4] The authorities cited by DOC support only the taxation of costs against a non-prevailing party, see 28 U.S.C. § 1920, Fed. R, Civ. P. 54(d), that paupers are not exempt from this rule, see 28 U.S.C. § 1915, McGill v. Faulkner, 18 F.3d 456 (7th Cir. 1994), cert. denied, 115 S.Ct. 233 (U.S. Oct. 3, 1994), Flint v. Haynes, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982), and that indigent criminal defendants have no absolute right to subpoena witnesses at the government's expense. See United States v. McGaha, 205 F. Supp. 949, 951 (E.D. Tenn. 1962). In a footnote, Jackson v. Vasquez, 1 F.3d 885, 891 n.5 (9th Cir. 1994), raised, but did not decide whether a federal court order compelling the state to transport a state prisoner for medical tests violated due process and the Eleventh Amendment.

Without question, the district court has the authority to order custodians to produce state prisoners in federal court. Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 40-41 (1985).

54(d) ("costs. . . shall be allowed as of course to the prevailing party").

This is not to reject the DOC's claim as unreasonable. There is a tendency for federal courts to treat state correctional agencies as de facto parties to all prisoner litigation, whether by requiring witnesses and litigants to be produced, accommodating judicial visits, disclosing addresses to the United States Marshal to effectuate service of process, and so on. Nonetheless, no authority exists for this court to assess costs for the benefit of one other than a prevailing party.

Accordingly, the court denies DOC's petition for reimbursement of costs.

E. Conclusion

For the foregoing reasons, the court:

(1) STRIKES Bill Sampley's Motion for an Enlargement of Time So Plaintiffs' Can Respond to Indiana Department of Correction's Petition for Reimbursement (sic) of Costs Expended Pursuant to Court Order (filed August 17, 1994 (#213));

(2) STRIKES Bill Sampley's Motion for Leave to File Delayed Notice of Appeal (filed August 17, 1994 (#212));

(3) GRANTS the plaintiffs' Motion for Continuance of Taxation of Costs (filed August 22, 1994 (#215));

(4) DEFERS ruling on Supt. Duckworth's verified bill of costs, AFFORDING

Supt. Duckworth to and including December 30, 1994 within which to file an affidavit in support of the items sought as part of the costs as required by 28 U.S.C. § 1924, detailing why the unidentified discovery is recoverable and was necessary; and

(5) DENIES the Indiana Department of Correction's "Petition for Reimbursement of Costs Expended Pursuant to Court Order" (filed August 11, 1994 (#210)).

SO ORDERED.

SO ORDERED.

ENTERED: November 22, 1994

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: J. Menadue
D. Moore
B. Sampley

(2)

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

No. 95-1517

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

INDIANA DEPARTMENT OF CORRECTION,
Petitioner,

v.

BILL SAMPLEY AND MICHAEL HOLLAND,
Respondents.

BRIEF OF RESPONDENT BILL SAMPLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

April 22, 1996

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1996

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REASONS FOR DENYING THE WRIT

I. THE COURTS BELOW CORRECTLY HELD THAT DISTRICT COURTS DO NOT HAVE AUTHORITY TO AWARD REIMBURSEMENT TO A STATE CUSTODIAN FOR COMPLIANCE WITH WRITS OF HABEAS CORPUS AD TESTIFICANDUM.

A. The district court did not have statutory authority to award IDOC transportation costs.

IDOC is not entitled to reimbursement under 28 U.S.C. § 1920. "Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). "The reasoning in *Crawford* is premised on the thesis that § 1920 *only* authorizes payments as directed by Rule 54(d)." *Sampley v. Duckworth*, 72 F.3d 528, 531 (7th Cir. 1995) (the decision below). Rule 54 allows award of costs *only* to prevailing parties. IDOC is not a prevailing party. The courts below correctly held they did not have authority to award IDOC reimbursement. *Id.*

Section 1920 provides for taxation of "fees and disbursements for printing and witnesses." 28 U.S.C. § 1920(3). Section 1821 defines the "fees and allowances" to be paid to witnesses. 28 U.S.C. §

1821(a).[1] IDOC insists that section 1821 *only* defines "fees," to the exclusion of "disbursements." It then urges that the term "disbursements" must be construed to embrace an award of transportation costs to a third-party custodian. IDOC's argument is "strained" and "flawed in its inception." 72 F.3d at 531. Section 1821, does not define just "fees" but also "allowances."[2] The "allowances" include transportation and accommodation costs. As the Seventh Circuit noted, "it [is] quite clear that the fees and disbursements referred to in § 1920(3) are both included in § 1821." 72 F.3d at 531. Moreover,

> [m]any, if not most, of the items covered by § 1821 are not "fees" in any sense of the term. These items, such as travel reimbursements, are deemed "allowances" by § 1821. Surely they could easily qualify as disbursements under § 1920(3). Nothing more than this natural reading of § 1821 is needed to save the word "disbursements" in § 1920 from statutory oblivion.

Id.

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[1]Section 1821(f), prohibits award of fees and allowances to incarcerated witnesses.

[2]IDOC's argument that section 1821 *only* defines "fees" is really baseless. The statute itself refers to "fees and allowances." 28 U.S.C. § 1821(a)(1).

In short, section 1821 defines items of costs "allowed," to be "disbursed" under section 1920, pursuant to the procedure of Rule 54. This statutory framework does not leave any room for IDOC's argument that "disbursements" should include the transportation costs of a third-party custodian. IDOC's argument is simply a "house of cards." 72 F.3d at 531.

B. The district court did not have authority, under the common law context of section 2241, to award IDOC transportation costs.

Some 207 years ago, Congress authorized writs of habeas corpus ad testificandum by enacting section 14 of the Judiciary Act of 1789, now codified in relevant part at 28 U.S.C. § 2241(c)(5). Since then, federal courts have had authority to issue the writ and state custodians have been required to bear the cost of transporting prisoners to court as a cost incident to incarceration. "At no time has that authority [to issue the writ] even been qualified by a requirement that the respondent custodian, state or federal, be compensated for compliance with the writ." *Story v. Robinson*, 689 F.2d 1176, 1179 (3d Cir. 1982).

> [T]he proper inquiry is whether Congress, which authorized district courts to issue [the writ], ever authorized reimbursement for the costs of compliance with a writ. We have not found any such Congressional authorization, nor has

> appellant cited to us a statute that would authorize reimbursement.

Wiggins v. County of Alameda, 717 F.2d 466, 469 (9th Cir. 1983), *cert. denied sub nom. California Dept. of Corrections v. United States*, 465 U.S. 1070 (1984).

The fact that Congress enacted 28 U.S.C. § 2241(c)(5) does not create a presumption that there ought to be a provision for reimbursement. "Enactment of a statute, compliance with which will require a state or entity to incur costs, does not in itself create a right of reimbursement." *Wiggins*, 717 F.2d at 469; *Sampley*, 72 F.3d at 532.

The expenses imposed on state custodians are in line with those imposed on other individuals summoned to court and given a modest per diem witness fee. "The fees are modest, and attendance frequently imposes serious financial burdens on witnesses. They must nevertheless respond without compensation, for *in our society the court's need for witness testimony is recognized as an ample justification for imposing such a burden.*" *Story*, 689 F.2d at 1179 (emphasis added). IDOC is not entitled to preferential treatment.

IDOC' claim that it is powerless to oppose the writ, *Petition* at 9, is without merit. IDOC had the opportunity to move to quash the writs. It did not do so. Nevertheless, the defendant superintendent who is a high ranking IDOC official opposed the prisoners'

motion for transportation orders. (R. 154, ¶ e, at 8).[3] The district court considered all papers, before issuing its orders. IDOC was entitled to no more process:

> Subpoenaed witnesses can move to quash such process on the ground of burdensomeness. If, however, the court concludes that the burden is justified by the necessities of the judicial process, the witness must bear it. We see no reason why any additional procedural safeguards should be afforded to custodians of witnesses.

Story, 689 F.2d at 1180.

Once the district court determines the production of prisoner witnesses is necessary for the case, the custodian must bear the transportation cost.

> [The state custodian's] position is that no matter how vital the testimony is or how important a prompt disposition of the case is to the parties, state custodians need not produce prisoner witnesses at state expense. *We reject that contention.*

Story, 689 F.2d at 1181 (emphasis added).

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[3]The defendant was represented by Indiana Attorney General's office.

II. THIS CASE DOES NOT PRESENT A CONFLICT AMONG THE CIRCUITS.

IDOC admits this case presents "no technical circuit conflict within the meaning of this Court's Rule 10.1." *Petition* at 11. Indeed, courts of appeals reaching the question have uniformly held state custodians must bear the cost of transporting their prisoners pursuant to writs of habeas corpus ad testificandum. *Sampley*, 72 F.3d 528 (7th Cir. 1995); *Sales v. Marshall*, 873 F.2d 115 (6th Cir. 1989); *Wiggins*, 717 F.2d 466 (9th Cir. 1983); *Story*, 689 F.2d 1176 (3d Cir. 1982).

In *Wiggins*, the Ninth Circuit upheld allocation to state of all transportation costs in compliance with a writ of habeas corpus ad testificandum. 717 F.2d at 469. To buttress its argument of an inter-circuit conflict, IDOC argues *Wiggins* holds district courts have discretion to allocate transportation costs to *anybody*. That is not true. *Wiggins* only "concluded that the district court had discretion to allocate costs of transportation of a state prisoner *between state and federal authorities*." *Sampley*, 72 F.3d at 532 (emphasis added). *Wiggins*, never held that the transportation cost may be assessed against the losing prisoner. "When there is no statutory authority . . . authorizing reimbursement to the state for the costs of compliance with [a writ of *habeas corpus ad testificandum*], then

there is no basis upon which the state can seek compensation for its expenses." 717 F.2d at 469.[4]

IDOC's citation to *Flint v. Hayes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982), is inapposite. The district court in *Flint* had assumed the cost of transportation was a cost born by the defendant, as opposed to a third party. As IDOC admits, "[t]his allocation was not even challenged on appeal." *Petition* at 11. Thus, *Flint* "focused entirely on the question whether costs may be taxed against indigents *at all*." *Sampley*, 72 F.3d at 532. The Fourth Circuit never reached the question whether a third party custodian may recoup the cost of its compliance with writs of habeas corpus ad testificandum.

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[4]To the extent *Wiggins* allowed allocation of expenses to U.S. Marshals, it was overruled by this Court in *Pennsylvania Bureau of Correction v. United States Marshals Srvc.*, 474 U.S. 34 (1985), which was decided one (1) year after Justice Rehnquist dissented from denial of certiorari in *California Dept. of Corrections*, 465 U.S. 1070.

III. THIS CASE DOES NOT PRESENT AN IMPORTANT, UNRESOLVED QUESTION WORTHY OF THIS COURT'S CONSIDERATION.

IDOC makes a number of policy-based arguments in support of its position. Those arguments are more appropriately addressed to a legislative rather than a judicial body. IDOC's policy arguments are not relevant to whether certiorari should be granted. They are misleading in part, incomplete at best, and deserve a short response.

A. Requiring prisoners to pay the cost of transporting prisoner witnesses to trial does not discourage frivolous lawsuits, because frivolous lawsuits never get to trial.

This appeal has nothing to do with frivolous lawsuits. By the time the district court issues the writ, the prisoner must have met a number of very stringent tests:

(1) Scrutiny under 28 U.S.C. § 1951 (the *in forma pauperis* statute), that the claim is not frivolous;

(2) Determination under Rule 12(b)(6) (motions to dismiss), that the case presents a valid legal claim for which relief may be granted;

(3) Finding under Rule 56 (motions for summary judgment), that the case presents a genuine

issue of material fact which must be resolved only at a trial; and

(4) Decision under 28 U.S.C. § 2241, that the particular witnesses sought are necessary for the prisoners to prove their case.

Here, the district court allowed prisoners to proceed under 28 U.S.C. § 1951. Defendants filed motions for summary judgment. After extensive litigation, the district court allowed prisoners to pursue their right of access to courts claim and denied their remaining claims. Prisoners requested issuance of writs of habeas corpus ad testificandum, and the defendant opposed them. The district court denied some of prisoners' requests and determined that only nine (9) prisoner witnesses were necessary to testify at trial.

Frivolous prisoner lawsuits never make it to trial. IDOC position would have the real effect of suppressing legitimate and substantial constitutional claims of prisoners.

B. There has been no explosion in the number of prisoner lawsuits.

In attempting to buttress its policy argument of why prisoners ought to pay transportation costs, IDOC claims that from 1985 to 1995, the number of prisoner lawsuits increased from 18,595 to approximately 40,000. *Petition* at 4-5. What IDOC neglects to tell the Court is that during the same period the number of prisoners in

this country also increased from 502,507[5] to over 1,104,074.[6] Indeed, the per capita filings of prisoner lawsuits has experienced a slight decline of about 3 % over the last decade.

IDOC suggests that all prisoner lawsuits are frivolous. IDOC cites no evidence for its position but quotes extensively from newspaper articles which are based on self-serving statements of state officials never subjected to cross-examination. No doubt, considering the volume it would be inevitable that some prisoners suits are frivolous.[7] But, many prisoner lawsuits

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[5]Bureau of Justice Statistics, *Prisoners in 1994* at 1 (Aug. 1995).

[6]Bureau of Justice Statistics, *Prisoners at Midyear 1995* (Dec. 3, 1995).

[7]There are other reasons why some prisoner cases are lost or even held frivolous: (1) prevalent functional illiteracy among prisoners, (2) extraordinary legal complexity of eighth and fourteenth amendment cases, (3) unavailability of counsel, (4) prison officials' almost total control of evidence in prison's closed environment, (5) prisoners' inability to carry on factual investigations in prison, and (6) the procedural mine field that section 1983 litigants must clear.

continue to present important and vital issues for judicial consideration.[8]

A large segment of our society is composed of individuals who have been either convicted or incarcerated during some period of their lives. At yearend 1994, 5.1 million Americans were on probation, in jail or prison, or on parole. That is nearly 2.7 % of all adult residents in the United States. Bureau of Justice Statistics, *Corrections Statistics* (1996). Most prisoners are indigent. If they were required to pay the

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[8]*See e.g., Farmer v. Brennan*, 511 U.S. ___, 114 S. Ct. 1970 (1994) (deliberate indifference standard for prisoner's reasonable safety needs); *Hudson v. McMillian*, 503 U.S. 1 (1992) (use of force by prison guards); *Turner v. Safley*, 482 U.S. 78, 90-91 (1987) (prisoners' exercise of religious rights); *Whitley v. Albers*, 475 U.S. 312, 320 (1986) (use of force during riots); *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (contact visits); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (to invoke the eighth amendment, prisoners must show that prison officials were deliberately indifferent to their serious medical needs); *Bell v. Wolfish*, 441 U.S. 520, 550 (1979) (access to publications and hardback books); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1977) (prisoners' solicitation and group meetings); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (media interviews); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (prohibiting "torture" and "unnecessary cruelty" against prisoners).

transportation costs of necessary witnesses, the majority of prisoners' legitimate claims affecting their liberty, their safety in today's violent prisons, and brutal conditions of their confinement will never reach trial. Neither Congress nor the courts should close their eyes to the plight of such a large segment of the society:

> There are different ways to look upon the inmates of prisons and jails in the United States in 1995. One way is to look upon them as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect; and then no issue concerning the degrading or brutalizing treatment of prisoners would arise. . . .
>
> I do not myself consider the 1.5 million inmates of American prisons and jails in that light. This is a non-negligible fraction of the American population.

Johnson v. Phelan, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, C.J., dissenting).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

April 22, 1996

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